Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

International Longshoremen's Association, Local 1657,

applicant,

and

Maritime Employers Association; Avant-Garde Sécurité Inc.,

employers,

and

Termont Terminal Inc.; Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers,

interested parties.

Board File: 29149-C
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June 5, 2014

The Canada Industrial Relations Board (Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, sitting alone pursuant to section 14(3) of the *Canada Labour Code (Part I–Industrial Relations)* (*Code*). Hearings were held from April 2 to 4, 2013; September 12, 19 and 20, 2013; and October 3 and 4, 2013.

Appearances

Mr. Ronald A. Pink, Q.C., and Ms. Jill Houlihan, for the International Longshoremen's Association, Local 1657;

Mr. Patrick Galizia and Ms. Anaïs Lacroix, for Maritime Employers Association and Termont Terminal Inc.;

Mr. Jean René Beaucage, for Avant-Garde Sécurité Inc. (on file);

Mr. Pierre Lalonde, for Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers.

I. Introduction

[1] Can an existing geographic certification for checkers in the Port of Montreal (Port) apply to a portion of a security guard company's operations?

[2] That question raised two complex issues. Firstly, does a part of the security company's operations fall within federal jurisdiction? If the answer is yes, then is that company actively engaged in longshoring for the purposes of the Board's geographic certification?

[3] This case resulted from a technological change at Terminal Termont Inc. (Termont), an entity performing stevedoring and terminal handling of containers in the Port. The Maritime Employers Association (MEA) is the employer representative for Termont and other employers operating within the Port's geographical certification.

[4] The International Longshoremen's Association, Local 1657 (ILA) and the MEA have negotiated successive collective agreements for the bargaining unit.

[5] Avant-Garde Sécurité Inc. (AG) currently provides security guard services to Termont. AG responded to the ILA's application, but later decided not to participate in the Board's oral hearing. The MEA led evidence and argued on behalf of Termont and, indirectly, AG.

[6] The Union des agents de sécurité du Québec, Local 8922 of the United Steelworkers (Steelworkers), is certified provincially to represent all of AG's security guards. Those guards' working conditions are governed by Quebec's *Decree respecting security guards*, R.R.Q., 1981, c. D-2, r.1 (*Decree*). The *Act respecting collective agreement decrees*, R.S.Q., chapter D-2, allows the provincial government to issue a decree to extend the application of a collective agreement in a particular industry to all employees and employers in that same industry. The *Decree* has done that for security guards in Quebec.

[7] The Steelworkers filed full written pleadings in this case and attended the oral hearing. After being present for the oral evidence, they decided not to attend or present final argument.

[8] Termont's technological change involved the installation of high definition cameras at its entrance and exit gates. The technology included Optical Character Recognition (OCR) capability which allowed computers to identify certain information on containers and vehicles.

[9] While the ILA's initial case focussed on activities at the exit gate, and the process involving empty containers leaving Termont's premises, the scope of the ILA's case later expanded.

[10] This led to the Board hearing evidence about both full and empty containers at Termont's exit gate, as well as about the technological changes which Termont had implemented at its entrance gate.

[11] During the Board's initial hearing dates in April, 2013, the MEA objected to the ILA's expansion of its case.

[12] The Board allowed the ILA to lead evidence on matters concerning both the exit and entrance gates. In its April 18, 2013 letter, the Board provided the MEA with additional time to provide any further submissions about the exit and entrance gates. The oral hearing did not resume until September 12, 2013.

[13] During final argument, the ILA limited its case to the activities of AG's guards for full and empty containers at the exit gate. This decision will be similarly restricted.

[14] In the early days of the technological change, the ILA filed grievances alleging that AG's guards were doing work covered by the checkers' collective agreement. However, under the terms of a later Letter of Understanding, all grievances except one were either settled, or allowed to lapse, while the Board's process unfolded.

[15] The Board has concluded that a portion of AG's operations falls within federal jurisdiction. The ILA also persuaded the Board that AG was actively engaged in longshoring, an activity which brought it within the scope of the geographic certification at the Port.

[16] Any collective agreement implications arising from the Board's conclusions will be decided by a labour arbitrator.

[17] These are the reasons for the Board's decision.

II. Background

A. Parties

[18] The Board originally certified the ILA in 1964 to represent checkers and coopers at the Port, though only checking is at issue here. The current description of the ILA's bargaining unit covers:

> all the employees of all the employers engaged in the checking and coopering of ocean-going cargoes in the territory of the Port of Montréal as this territory is currently described in Scheduled II of the *Canada Ports Corporation Act*, R.S.C, 1985, c. C-9, **excluding** the other employees already represented by a bargaining agent.
>
> (emphasis in original)

[19] The MEA-ILA collective agreements have described some of the functions which constitute "checking". One such collective agreement, which expired on December 31, 2008 (Ex-2; Tab 1), included articles 1.05 and 1.09:

> **1.05** **No person other than those included in the bargaining unit shall have the right to perform any work which is covered by the said bargaining unit** except as is provided in clause 1.08.
>
> ...
>
> **1.09** All Checkers, Head Checkers, Coopers, Floormen and Stowagemen must be members of Local 1657, provided they do not exercise managerial functions.
>
> **The parties to this agreement agree that all checking in the Port of Montreal must be performed by members of Local 1657, when checking is required to be performed.**
>
> **Checkers work, functions and duties are the following, but not limited to:**
>
> - **All checking related to the receiving and delivery of cargo, baggage and containers and to the loading and unloading of all carriers must be performed by Checkers members of Local 1657.**

- **All checking related to containers that are processed with handheld computers** or mounted radio frequency units in gantry cranes.

- All painting and stenciling of cargo, labeling of baggage and strapping of cargo in sheds or on sections must be performed by Coopers members of Local 1657. This does not include securing in containers, strapping of Mafis or pre-slung.

- **Counting, separating and marking of cargo.**

- **Checking of empty/full containers for damages.**

- Checking related to stuffing, destuffing of containers.

- Updating and shifting of containers in the terminal.

(emphasis added)

[20] The parties' subsequent collective agreement, the term of which expired on December 31, 2012 (Ex-2; Tab 2), added two more items to the non-exhaustive list of checking work described in article 1.09:

- **Placing and recording of seals on containers and sealed cargo within terminal confines except for containers under customs control.**

- The verifying and placing of hazardous placards within terminal confines.

(emphasis added)

[21] Since section 1.09 of the collective agreement expressly does not provide an exhaustive list of checkers' duties, the ILA argued the Board should look at other documents in order to understand the full scope of its members' checking functions for the purposes of the geographic certification.

[22] For example, page 8 of the ILA-MEA "Selection Test" (Ex-1; Tab 6) described a checker's "Duties and Tasks":

CHECKER

Duties and Tasks

Under the directions of management, the checker is the employee, whom [*sic*], in situations of import and export of cargo (container/general), does the receiving, delivery, noting of damages and directs the movement of the cargo on the terminal, from its entry to the loading aboard the vessel and from

> the unloading of the vessel to its exit of the terminal. The checker is the one who does the inventory of the yard of all cargo and instructs the longshoremen on its separation and placement and movement within the terminal and to all carriers (vessel, rail, truck, etc...).
>
> (bold in original)

[23] The evidence showed that this was a general definition of checking for the entire Port, rather than one focussed solely on checking work at Termont.

[24] The ILA further referenced page 44 of the "Selection Test" which described a checker's functions at the exit gate:

> - Exit gate:
>
> Recording Seal #, License # of trailer and your signature on Interchange.
>
> Checking Container number, Trucking Company Name, Date, Drivers signature and Hazardous Labels are as indicated on Interchange.
>
> Record any Notations as far as damages in the area provided on the interchange. (Any serious damages or broken seals must be reported to the office)
>
> Record Container number of empty on interchange.
>
> Once verified, separate the copies of the interchange according to the specific request of each terminal (Trucker, Guard, Checker, Original)

[25] The reference to an "interchange" refers to a document entitled "Terminal Interchange Receipt" (TIR), *infra*.

[26] The MEA cautioned the Board that the "Selection Test", which did not form part of the collective agreement, applied generally to employers in the Port and was not specific to Termont. The evidence confirmed that the checker functions at the exit gate as described in the "Selection Test" did not reflect Termont's new practice at its exit gate after the technological change.

[27] AG is a security guard company. It took over the security contract at Termont in 2010 (Ex-2; Tab 19). AG's financial statements and employee hourly records (Ex-8; and Ex-9) are subject to a confidentiality order. It is sufficient to know that AG services many clients.

[28] AG supplies guards to other Port employers, as well as to other Quebec entities.

[29] AG, which employs over 400 employees, supplies 20 employees to Termont, 13 of whom work full-time for 40 hours a week. The full-time employees, who are assigned permanently to the Termont contract, may work more hours for other AG clients if they desire and AG has the need.

[30] AG mainly provides access control services to Termont. However, they also conduct patrols and provide perimeter security.

[31] AG's licenced guards require both an ISPS certification as well as an "R2", referred to at the hearing as a "Blue Card". AG's contract further calls for 16 hours of Termont-specific training (Ex–2; Tab 19).

B. Chronology of Specific Events

1. May, 2004

[32] In May, 2004, the *Marine Transportation Security Regulations*, SOR/2004-144, last amended on December 15, 2008 (Ex–3; Tab 31) (MTSR), imposed new obligations on Termont and other employers in the industry. Generally, the MTSR provides a framework to detect security threats and take measures to prevent security incidents that could affect marine vessels and their facilities. The Board heard considerable evidence about the type of security obligations the MTSR imposed.

2. June, 2010

[33] By letter dated June 21, 2010, the MEA, on behalf of Termont, gave the ILA notice of a technological change at the entrance and exit gates (Ex–2; Tab 3):

> SUBJECT: ARTICLE 22.04 TECHNOLOGICAL CHANGE/TERMONT TERMINAL GATES
>
> Dear Mr. Mulcahy:
>
> The following is to inform you of new gate operations beginning in November 2010 at Termont Terminals. As per the collective agreement, a meeting will be held the week following the reception of this letter to discuss the anticipated changes.

[34] On June 29, 2010, the ILA and the MEA met to discuss the technological change. The MEA described the technological change and the impact it would have on ILA members.

3. October, 2010

[35] By letter dated October 12, 2010 (Ex–2; Tab 4), the ILA requested a written response to certain questions it had regarding the proposed technological change. On October 22, 2010, the MEA provided a two-page written response to the ILA's seven specific questions (Ex–2; Tab 5).

4. February, 2011

[36] On February 17, 2011, the parties met again to discuss the technological change.

[37] On February 25, 2011, the MEA sent the ILA the Minutes (Ex–3; Tab 27) of their February 17, 2011 meeting. The Minutes were drafted in French.

[38] On February 28, 2011, the ILA (Ex–13) asked for a translation of the Minutes on the basis, *inter alia*, that the meeting had taken place almost entirely in English and it wanted the minutes to reflect exactly what had been said about the security guards not doing checkers' work:

> ***The reason we would like to have copy in english is that most of meeting was conducted in english and looking at your version is somewhat confusing. One example would be that we do not recall R. Carre exact words of him saying that the security guards would not be infringing on Local 1657 jurisdiction.***
>
> Also in your 4th paragraph you stated that Mr. Dubreuil confirms that the job of the checker that he is doing today will now go back to the security guards because the checking of damages will no longer exist? ***Let's be very clear the security guards have never checked any containers for damages or checked the inside of containers for stowaways contraband or anything other.*** Even today they only check the number of container **after and I stress after the checker has done his job**.
>
> [*sic*]
>
> (bold in original; italic bold added)

5. April, 2011

[39] On April 14, 2011, Termont gave notice (Ex–2; Tab 6) to four ILA checkers, who held the status of "permanent employee", that their positions would be abolished as of April 23, 2011. "Permanent employees" are not dispatched daily to do checker work, but instead work permanently at Termont.

[40] The ILA filed several grievances related to the technological change, some of which specifically referenced the work security guards performed.

[41] On April 18, 2011, the ILA filed a grievance (Ex–2; Tab 7) alleging that security guards would be doing the checkers' work:

> ...The information given to union as of the date of this grievance makes the union believe that non members of Local 1657 will be performing in whole or part of our job. **Security guards have been hired to perform what the checkers have been doing for over 25 years. The decision to abolish the job of the checkers is merely to replace them with security guards. This is clearly a violation of the collective agreement presently in force** and therefore we are claiming for all lost monies to the following members, the union and to all who will be affected by this new technology.
>
> (emphasis added)

6. May, 2011

[42] On May 12, 2011, the ILA filed grievance #09-11 (Ex–2; Tab 9) alleging that the checking of containers for damage was not being done by checkers:

> On Tuesday May 10th I was informed that Transport Canada had changed its position regarding breaking of seals and opening containers in the Terminals other than the gate. (Please see previous position in February 2011). This issue was addressed in February as the local did not agree with truck drivers opening and checking for damages in the Terminal. ***With Transport's decision in February the local felt that issue had been corrected as the truck drivers had to open containers and checkers would check for all damages at the gate.***
>
> ***Due to the change of Transport views, on the week of May 9th at Termont Terminal non members of Local 1657 (Truck Drivers) are opening empty containers to check for damages this is clearly a violation of the collective agreement presently in force.*** We are claiming for 2 checkers on every shift (08:00 and 16:00 shifts) that a container is opened by a truck driver and checked for damages in the section without a checker to be paid at applicable rate to the Local.
>
> **Please consider this as a continuous grievance until such matter is resolved and we are requesting that this issue be submitted immediately to arbitration to be resolved.**
>
> (bold in original; italic bold added)

[43] After the negotiation of a Letter of Understanding, *infra*, prior to the Board commencing its oral hearing, only this grievance (#09-11) remained outstanding between the ILA and MEA.

7. June, 2011

[44] On June 29, 2011, the ILA grieved (Ex–2; Tab 10) that security guards and truck drivers were checking containers for damage, a function reserved to checkers under the collective agreement:

> **On June 28th 2011 at Termont on the 08:00-16:00 shift non members security guards and truck drivers were checking empty containers at the gate for damages and used the new operating system**. The transport was JAF #5130 PLATE Ra 3618T. The following containers were checked Fsc 7766888 Msc 1198514 and 3071025.
>
> **This is clearly a violation of the collective agreement** and therefore we are claiming for 8 hours for 2 checkers to be paid at the applicable rate to the Local.
>
> (emphasis added)

8. August, 2011

[45] On August 11, 2011, the ILA grieved (Ex–2; Tab 11) that security guards at the exit gate were checking containers:

> **On August 10th 2011 on the 06:00-16:00 at Termont Terminal on the outgoing gate non members of Local 1657 were performing duties of checkers with regards to checking containers. Security guards are checking containers and when a problem arises due to the new automated gate they are contacting / giving information to the office.** This has been historically jobs late checkers do and continue to do.
>
> **This is a blatant disregard of our jobs and there we are claiming for 3 checkers to be paid at the applicable rate and that this grievance be considered as a continuous grievance.** Also we are requesting immediate arbitration through "arbitrage acceleree".
>
> (emphasis added)

9. September, 2011

[46] On September 26, 2011, the ILA grieved (Ex–2; Tab 12) that a guard had reported container damage to a Termont supervisor:

> **Om Monday September 26th 2011 on the 06:00-16:00 shift at Termont terminal non members of local 1657 (Security Guards Raphael) called over the radio to supervisor Jacques that container FSCU 613 8233 was damaged and had to be brought back into the terminal.** This happened again when the guard called over radio now a full container tghu 1814605 door was not closing because of a damaged handle.

This is clearly a violation of the collective agreement and therefore we are claiming for 2 checkers to be paid at the applicable rate to the local

[*sic*]

(emphasis added)

10. December, 2011

[47] On December 2, 2011, the Board received from the ILA the current section 18 application asking the Board "to include the Respondent, Avant-Garde Security, as a longshoring contractor in the Port of Montreal under the Applicant's certification order". The Board initially issued certain procedural decisions arising from the pleadings. Despite an attempt to start the oral hearing in September, 2012, ultimately the matter could not begin until April, 2013.

11. December, 2012

[48] On December 3, 2012, at the time the parties concluded a new collective agreement, the ILA and the MEA negotiated a Letter of Understanding (Ex–3; Tab 20) regarding numerous outstanding grievances, including those described above. Some grievances were settled, one remained pending, and the ILA had 90 days to take four (4) specific grievances to arbitration. All other pending grievances were considered withdrawn.

[49] The fallout from the Letter of Understanding meant that only the May 12, 2011 grievance (#09-11) described above (non-checkers checking empty containers for damage) remained outstanding. All other grievances were either settled or abandoned, under the terms of the Letter of Understanding.

[50] In consideration of the various settlements described in the Letter of Understanding, some of which included payments to ILA members, the ILA gave the MEA a full and final release.

C. The Exit Gate: Before and After the Technological Change

[51] The Board heard considerable evidence about the checkers', the guards' and the drivers' activities at the exit gate.

[52] This evidence described the functions they performed both before the full implementation of the technological change and afterwards. The planning for the technological change started in 2009, but it was not fully operational until 2012. For a period in 2011, both the new and old systems ran concurrently.

[53] The MEA maintained that, due to the OCR technology, drivers no longer had to exit their vehicles. As a result, trucks started entering and leaving Termont far more quickly.

[54] According again to the MEA's evidence, the computerized system lowered the risk of human error, whether such errors were unintentional or otherwise. This assisted Termont in meeting its security requirements, including those imposed by the MTSR.

[55] The parties frequently referred to the TIR (Ex 4). The MEA described how a checker prior to the technological change used the TIR when checking containers at the exit gate. However, after the technological change, Termont no longer used any checkers at the exit gate. There was no paper TIR to complete under the new exit process.

[56] The Board heard evidence from several witnesses about the checking activities at Termont.

[57] The ILA's local President, Mr. Albert Batten, testified about his experiences as a long-time Termont checker. Mr. Christian Parent, a Health and Safety Officer for the ILA, also testified about his long experience as a checker. Mr. Parent had far less Termont-specific checking experience compared to that of Mr. Batten.

[58] The MEA's main witnesses were Mr. Julien Dubreuil, Project Director at Termont, and Mr. Stephen Chyzenski, the Director of Security at Termont. The MEA also called AG's President, Mr. Yvon Lalonde.

[59] The MEA objected to the relevance of the testimony of Mr. Rick Robinson, who had decades of experience as a checker in the Port of Halifax, but who had never worked in Montreal. The Board did not conclude that Mr. Robinson's general evidence about checking should be excluded. But neither did the Board rely on evidence about checking in Halifax in this decision. The essential evidence for the Board concerned what was actually taking place at Termont.

[60] The parties' main witnesses described checkers' duties at the exit gate, both before and after the technological change. Their evidence was not always consistent, but the Board found all the witnesses to be forthright and candid in their testimony.

1. Before the Technological Change (< 2011)

a. Exit gate

i. Checkers

[61] The duties of the checkers, some of which are listed in article 1.09 of the collective agreement, *supra*, differed depending on whether the container was full or empty.

i.i Full Container

[62] The checker verified the information on the TIR. The TIR information included the: i) container number and type; ii) container location in yard; iii) seal number; iv) dock receipt; v) carrier; vi) vehicle licence; and vii) shipping line.

[63] The TIR document had space on which to indicate the location of container damage. The TIR contained some of the above information when the checker received the printed form. The checker added other information manually, such as the container's seal number.

[64] Full containers with seals were never opened or inspected. Rather, the seal ensured no tampering had occurred during the container's transit.

i.ii Empty Container

[65] The checker also checked certain information on the TIR for empty containers leaving Termont. There would be no need to register the seal, given the container was empty. Any seal on the container would be broken.

[66] The checker often did a thorough damage inspection, especially for containers which would house dry cargo like paper. The driver would open the container. The evidence differed whether the checker or the driver actually got inside the container. When the container doors were closed, whoever was inside could verify if any incoming light suggested the existence of punctures.

[67] The evidence differed whether the security guards checked to ensure the container was empty. Both Mr. Batten and Mr. Parent maintained that the security guards never exited their booths to look inside the container.

[68] On the other hand, Mr. Dubreuil and Mr. Chyzenski testified that the guards' duties included verifying whether the container was truly empty and contained no stowaways or contraband.

[69] According to Mr. Dubreuil, if there was an empty box or piece of wood inside, this was of no concern to the checker. Mr. Batten disagreed that a checker would ever release an empty container with anything inside it. The container had to be empty; not even garbage could be inside it, according to Mr. Batten.

ii. Guards

[70] The guards' functions at the exit gate included verifying the identity of the driver, checking the vehicle's licence, as well as ensuring there were no unauthorized individuals in the driver's truck cabin.

[71] Termont's procedure manual (Ex 2; Tab 15) documented the security guards' duties, several of which involved verifying information appearing on a computer screen. Some of this information corresponded with information on the TIR:

> **PROCEDURES FOR THE EXIT OF TRUCKS FROM THE TERMINAL**
>
> **MAIN TRUCK EXIT (TERMINAL)**
>
> The Security Officer, on duty at the truck/container exit, must ensure:
>
> ...
>
> c) That upon the arrival of a truck at the exit gate, they select the "FIND BY PLATE" option in the database. They must then enter the license plate number of the truck which is before them and then click OK. ***This will bring up all the pertinent information with regard to the truck/container, this includes the transaction number as per the TIR, the name of the transport company, tractor's license plate number and container number, if the container is empty, full or if the truck is leaving empty frame or if it was a destuffing, etc.***

d) ***That all drivers/trucks leaving the terminal property with a container loaded or empty MUST present copies of Annex C and Annex D of the interchange documents to the security guard on duty at the document verification station.***

e) ***The security guard on duty at the document verification station MUST compare all the information found on the computer system monitor.***

f) ***The information MUST correspond EXACTLY with all the information that he / she has before them.***

   a. ***Transaction Number***
   b. ***Container Number***
   c. ***Licence Plate number of the truck***

g) At all times, the first item that must be verified is the daily transaction number. It MUST correspond exactly with the transaction code for the day.

h) ***The number on the container and the license plate number of the truck (tractor) are identical to those printed on the interchange, as well as on the computer screen.***

i) That Annex D of the interchange is given to the driver and that Annex C is kept by the security guard at the verification station.

j) At **NO TIME is a truck/container allowed to leave** the property of the terminal without an exact match of documents supplied by the driver and those that are on file.

[*sic*]

(bold in original; italic bold added)

[72] Mr. Batten testified that several of the guards' functions involved checking the same information the checker had already done.

[73] Mr. Dubreuil and Mr. Chyzenski both testified that AG's security guards ensured there were no stowaways or contraband in the empty containers. This function was part of their training. Mr. Parent confirmed he had never received training to look for contraband items.

[74] Mr. Parent testified about his recent observations at Terminal 52 in the Port, where Termont stored its excess empty containers. The work of guards and checkers at Terminal 52 followed the pre-2011 system; no technological change ever occurred there.

[75] According to Mr. Parent, a driver at Terminal 52 obtained a TIR from a clerk before leaving with an empty container. The checker took the driver's TIR and checked, *inter alia*, the container number. The checker broke the seal on the container, if any, and verified the inside of the container. When satisfied, the checker returned the TIR to the driver.

[76] At the gate, the guard inspected the driver's ID and opened the gate. The guard did not verify if the container had any damage, since the collective agreement explicitly gave that function to checkers.

2. After the Technological Change (> 2011)

[77] The technological change reduced the number of checkers, guards and clerks Termont employed. While some checkers still worked at the entrance gate, Termont no longer used any checkers at its exit gate.

a. Exit gate

i. Checkers

[78] Termont decided as part of the technological change no longer to inspect containers for damage, a task formerly reserved for checkers. There had been grievances filed about this issue, *supra*. However, if a driver noted damage to a container, then Termont would call a checker to do the required checking work.

[79] The MEA argued that the OCR technology now performed all of the checkers' previous functions.

ii. Guards

[80] The guards' duties differed after the technological change, again depending on whether the container was full or not.

[81] The JLA referred to Termont's procedure manual (Ex 2; Tab 16) as evidence that the guards, rather than the OCR system, were performing various types of checking work:

Termont

Terminal de Montréal **Standard Operating Procedure Term-002**

PROCEDURES FOR THE EXIT OF TRUCKS FROM THE TERMINAL

MAIN TRUCK EXIT (TERMINAL)

The Security Officer on duty at the truck/container entrance/exit control booth must ensure:

a) That at the beginning of their shift the computer has been turned on and is ready for the opening of the terminal.

b) That upon the arrival of a truck at an exit lane the driver must introduce the computer generated coupon which he received at the stage 1 located at section 74.

c) The driver must also swipe his port access card which electronically relates his information with the pick up number within the Termont computer system. During the same instance, the optical Character Reader (OCR) system will validate that the container numbers are the same on three sides of the container and perform a matching process to the waybill information found within the computer system.

d) **High definition CCTV cameras within the out lanes will photograph the license plate of the cab of the truck and capture the face of the driver of the truck and the rear of the container; including camera presets for the viewing of container seals and also for the interior of empty containers.**

e) **Simultaneously a camera at the rear of the truck will survey the containers door hasps and show the placement of a seal.**

f) **In the case of an empty container, the driver will be required to open the containers doors for inspection. This inspection will also be performed remotely by way of CCTV camera.**

...

j) **In the case of an empty container the security guard must assure that there is neither contraband nor stowaways located within the container.**

k) **After all the exit criteria have been met these being the identification of the driver is certain, the seal is visually intact and in the case of an empty container, it is confirmed to be free of merchandise or persons and that all operational criteria have been met, the security guard may then open the gate and the truck will be able to proceed.**

[*sic*]

(emphasis added)

[82] Any matching error between the OCR system and Termont's computer would be flagged on a Termont clerk's computer, apparently without the guard's input or knowledge.

[83] Mr. Chyzenski testified that if the OCR system did its job, then information about the container would come up on the guard's screen for verification. A picture of the driver would also appear side by side with the live picture from one of the exit gate's cameras.

[84] The guard, using a high definition camera, further ensured any full container had a seal. If the container had no seal, the guard would alert Termont who would call a checker. Mr. Dubreuil testified the seal's information had already been provided by the shipper to Termont.

[85] Termont had decided no longer to check the seal number itself, but only whether the container had a seal. Mr. Dubreuil confirmed in his testimony that one of the guards' functions was to ensure the correct container went out at Termont's exit gate.

[86] Mr. Dubreuil testified that on about five occasions a guard had brought container damage to Termont's attention. Termont advised the guard that noting container damage was not among his functions. Such conduct did not reoccur.

[87] For empty containers, the guard had additional functions. The driver got out of his truck and opened up the empty container. The guard then used a camera to check inside the container for stowaways or contraband.

[88] According to Mr. Dubreuil, the guard previously did this work by looking into the back of the container from his booth, or by moving outside for a better view if required. Mr. Batten, as noted, testified guards never exited their booths and that checkers had always done this specific work.

III. Relevant *Code* Provisions

[89] Section 18 of the *Code* creates a review power for the Board:

> 18. The Board may review, rescind, amend, alter or vary any order or decision made by it, and may rehear any application before making an order in respect of the application.

[90] This review power allows the Board, *inter alia*, to revisit its certification orders (*Garda Cash-In-Transit Limited Partnership*, 2010 CIRB 503), including a geographic certification, and to reconsider its recent decisions (*Buckmire*, 2013 CIRB 700).

[91] The ILA's application asked the Board to review and confirm that its existing geographic certification applied to AG. Section 34(1) of the *Code* creates a special geographic certification regime for the longshoring industry:

> 34.(1) Where employees are employed in
>
> (*a*) the long-shoring industry, or
>
> (*b*) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board,
>
> the Board may determine that the employees of two or more employers actively engaged in the industry in the geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

[92] The *Code* usually envisages certification orders applying only to a single employer. However, if two or more employers are actively engaged in longshoring, then section 34 allows the Board to find that their employees constitute a unit appropriate for collective bargaining and to certify a trade union for that unit.

[93] This Board's predecessor, the Canada Labour Relations Board (CLRB), in *Halifax Grain Elevator Limited* (1989), 76 di 157 (CLRB no. 725) (*Halifax Grain 725*) described this unique regime, a description which remains fully accurate today:

> Section 34 of the *Code* (formerly section 132) is unique in that the Board has been given the extraordinary power to join together, for the purposes of collective bargaining, independent and unrelated federal works, undertakings or businesses. Section 34 is applicable only to the longshoring industry and, although the Board does have the power to recommend the extension of section 34 to other industries, this has never been done.
>
> (page 163)

[94] Termont is one of the employers subject to the Board's geographic certification in the Port. The ILA argued that certain activities AG carried out at Termont had brought it within the geographic certification.

IV. Geographic Certification: Legal Principles

[95] There is general agreement about the legal principles governing section 34 of the *Code*. It is their application which generates debate.

[96] The Supreme Court of Canada's (SCC) decision in *Reference Re: Industrial Relations and Disputes Investigation Act*, [1955] S.C.R. 529 (*Stevedores Reference*) concluded that the business of loading and unloading of ships, given its close relationship to maritime transportation, fell within Parliament's constitutional jurisdiction in certain situations.

[97] The *Stevedores Reference, supra,* noted that stevedoring also covered both the storage and checking of cargoes, as well as ancillary clerical duties. This is the reason the Board had jurisdiction to certify a bargaining unit which included checkers.

[98] In *Tessier Ltée* v. *Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23 (*Tessier*), the SCC reviewed how it had applied the *Stevedores Reference, supra,* given that that 1955 decision had contained multiple sets of reasons:

> [28] Section 92(10) concerns the authority over shipping works and undertakings, a power that, as noted, includes the authority to regulate the labour relations of those employed on the work or undertaking. The entire scheme of s. 92(10) turns on the territorial scope of the shipping activities concerned. The principle that has therefore developed about labour relations in the shipping context is that jurisdiction depends on the territorial scope of the activity in question. **Since stevedoring is not itself a transportation activity that crosses provincial boundaries, it will not be subject to federal regulation directly under s. 92(10)(*a*) or (*b*): *Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, at paras. 43 and 61. Rather, a stevedoring work or undertaking will be subject to federal labour regulation if it is integral to a federal undertaking in a way that justifies imposing exceptional federal jurisdiction.**

> [29] That is how this Court has interpreted the *Stevedores Reference*. As previously noted, the eight judges in the *Stevedores Reference* who concluded that the Toronto shipping company was subject to federal labour regulation wrote separate reasons setting out different approaches to support their conclusions, making it unclear whether there was a unifying, underlying ratio.
>
> (emphasis added)

[99] The SCC confirmed that federal jurisdiction applied to stevedoring only if it formed an integral part of extra-provincial transportation by ship:

> [34] The effect of the *Stevedores Reference* as interpreted over time, then, is that stevedoring is not an activity that brings an undertaking directly within a federal head of power, at least for purposes of labour relations regulation. **Rather, Parliament will only be justified in regulating these labour relations if the stevedoring activities at issue are an integral part of the extra-provincial transportation by ship contemplated under s. 92(10)(*a*) and (*b*).** This result is consistent with the understanding of the division of powers over shipping under ss. 91(10) and 92(10) and its exceptions reviewed above.
>
> (emphasis added)

[100] Other court cases have emphasized that not all activities carried out on a wharf necessarily fall within federal jurisdiction.

[101] A key case explaining this distinction is *Cargill Grain Co., Gagnon and Boucher Division* v. *International Longshoremen's Assn., Local 1739*, [1983] F.C.J. No. 948 (QL) (*Cargill*). In that decision, the Federal Court of Appeal (FCA), in three separate sets of reasons, found that Cargill, which handled its own grain on the wharf after it had been unloaded, was not engaged in longshoring.

[102] Mr. Justice Pratte noted that the Board's jurisdiction was necessarily dependent on a link between Cargill and maritime transportation. Since Cargill's employees did not unload any ships (the ship's crew had already unloaded Cargill's grain), no such link existed:

> [11] Under both the Constitution and the *Canada Labour Code*, the Board could only exercise jurisdiction in respect of the employees of [the] applicant if the latter were engaged in a federal work, undertaking or business. The business of selling grain which applicant operates in Quebec City is a purely local business. **The only federal work, undertaking or business with which the work of applicant's employees could be connected is that of maritime transport, which takes applicant's grain from the Great Lakes to Quebec City. For the Board to have jurisdiction over applicant's employees, therefore, they would have to be employed in the federal work, undertaking or business of maritime transport.**

> [12] **The employees of applicant in question here do not unload ships: this work is done by members of the ship's crew.** Applicant's employees operate and maintain equipment which transports grain to silos (after it has been unloaded and moved to applicant's facilities) and then moves it on to the trucks of applicant's customers. **When these employees perform this work, the maritime transport has ended, since the goods have arrived at their destination and are in the possession of the recipient. For this reason, the work of these employees does not seem to me to be connected with transport, but rather with the grain business operated by applicant in Quebec City.**
>
> (emphasis added)

[103] Mr. Justice Marceau concluded the CLRB had erred in its finding that Cargill's employees' work on the wharf constituted longshoring. That work was not necessary to complete the maritime transportation of the grain:

> [26] With respect, I dispute the validity of this reasoning. In my view, the error it contains is treating as general a situation which only occurs under very specific circumstances. **Because operations of sorting, handling and storing goods can be an incidental part of transport by sea, it does not follow that all operations of sorting, handling and storing goods, even on a wharf, are necessarily a part of such transport. In my view, operations of this type are an incidental part of longshoring, and as such connected with the transport itself, when they are actually necessary in order to complete the transport operation and ensure that the goods are delivered to their recipient**. As I understand it, the *Stevedoring* decision says nothing more than this.
>
> (emphasis added)

[104] Mr. Justice Hugesson agreed that not all handling and storage at dockside was necessarily longshoring. Cargill's employees were dealing with the company's own goods, which had already been unloaded.

> [36] In my view, according to the ordinary meaning of the word, longshoring (le débardage) is basically the operation of loading and unloading ships. ... In some cases, as ancillary to this principal operation, it may also include the handling and storage at dockside of goods which have been loaded or unloaded. **But surely that does not mean that all handling and storage at dockside is necessarily longshoring, especially when such operations are carried out as ancillary to other activities which have nothing to do with the loading or unloading**.

> [37] **In present case, the ships are unloaded by their crews. The grain, once delivered on the dock, has arrived at its destination and passes under the control of its owner, the applicant, for the purposes of its business as a supplier of feed grains. The employees of the applicant who look after the handling and storage on the dock are only receiving goods which have already been unloaded.** Even then they spend only a tiny proportion of their time on this aspect of their work. (From 1 June 1981 to 12 May 1982 five ships arrived at the applicant's terminal; the average time to unload a ship is thirty hours.) Hence, they do not work in the longshoring industry and are not covered by s. 132 of the *Code*.
>
> (emphasis added)

[105] The CLRB in *Halifax Offshore Terminal Services Limited et al.* (1987), 71 di 157 (CLRB no. 651) (*Halifax Offshore*), applied the FCA's *Cargill*, *supra*, reasoning, when it found that companies not involved in maritime transportation, even if they loaded and unloaded products which required checking in a port, fell outside the longshoring industry:

> Those statements of the Federal Court of Appeal make it quite clear that not all handling and storage of goods at the dockside are necessarily part of the longshoring industry referred to in section 132 of the *Code*. **Keeping in mind that loading and unloading of vessels is only brought into federal jurisdiction by virtue of it being an integral part of maritime transportation, it naturally follows that the checking work done by the employees sought by the Checkers' union would also have to be directly related to the loading and unloading of ships engaged in maritime transportation.**
>
> (pages 171–172; emphasis added)

[106] In *Halifax Offshore*, *supra*, the Board concluded that some of the employees in question were not performing checking work within the larger context of maritime transportation.

[107] The CLRB commented further on the necessary link to maritime transportation in *Maritime Employers' Association et al.* (1991), 84 di 161 (CLRB no. 857) when it excluded from a geographic certification those employers who transported their own goods:

> It must be understood that, in using the term "longshoring industry," in the port of Hamilton, the Board intends not to draw into the certification order employers who are not in the business of longshoring, but do send out or receive products on their own account via vessels which are loaded or unloaded by their own employees. The intention is to apply the certification order in the port of Hamilton to those who are in the business of contracting to load or unload ships for others for remuneration. ...
>
> (page 168)

[108] Numerous cases have required the Board to determine whether an employer's activities in a port constituted longshoring or not. Evidently, this is rarely, if ever, an issue involving established longshoring companies. Most cases arise when an employer in a different industry is alleged to have performed longshoring activities which fall under a geographic certification. The Board often considers whether a part of an employer's operations has extended itself into the longshoring industry.

[109] In the instant case, the allegation is that a subcontractor like AG, which no one contests provides security services, has also been assisting Termont with its longshoring activities.

[110] In *M&M Manufacturing Limited* (1997), 104 di 45 (CLRB no. 1203) (*M&M Manufacturing*), the Board applied the geographic certification to an employer for a single episode of providing longshoring services:

> **M&M, in loading and unloading the tank in question, has for the purposes of section 34 of the *Code* extended itself into the longshoring industry.** See *Halifax Grain Elevator Limited*, *supra*. In the geographical area of the port of Halifax, any loading or unloading of goods from commercial vessels, even if the said goods are owned by or for use in the operation of the consignee, is longshoring and must be done pursuant to the terms of the Board's geographical certification order.
>
> **While the work performed by M&M could be considered inadvertent and sporadic, it is not something that can be permitted. To do so would allow this type of incident to occur on a regular basis and have a detrimental effect on the movement of goods at the port. This would undermine the collective bargaining system at the port, invite labour relations unrest, and defeat the purpose of section 34.**
>
> (page 51; emphasis added)

[111] In *Maritime Employers Association*, 2011 CIRB 581 (*MEA 581*), the Board considered whether an employer's work constituted longshoring. The employer, Waterford, a company involved in the production of aggregates, performed several tasks for a client, including i) transporting products from a stockpile; ii) loading them into a hopper; and iii) operating the conveyor which carried the products onto a vessel.

[112] The Board concluded this portion of Waterford's activities constituted longshoring for the purposes of the geographic certification in the Port of Hamilton:

> [30] Accordingly, the Board finds that, for the portion of its activities on behalf of US Steel Canada that involve transporting the products from a stockpile, loading them into a hopper and operating the conveyor taking the products up to the vessel, Waterford is engaged in longshoring in the Port of Hamilton and is subject to the collective agreement between the MEA and ILA 1654. As a result of this determination, the Board finds that Waterford is in violation of the Board order of November 9, 2009, and it is hereby directed to comply with that order without further delay.

[113] Most cases under section 34 involve the direct loading or unloading of ships. The instant case is more challenging. Unlike a situation where there is no dispute whether a ship was loaded or unloaded, the parties here dispute whether any checking work has occurred at the exit gate for containers leaving Termont.

V. Parties' Positions

A. ILA

[114] The ILA's final argument had three parts.

1. Were AG's security guards doing checking work at the exit gate?

[115] The ILA stressed that the importance of the concept of checking in this case required a decision from the Board, rather than from a labour arbitrator. The Board had mentioned orally to the parties at certain times during the hearing that the evidence in the case seemed very similar to that relevant to a work of the bargaining unit grievance.

[116] The ILA accepted that employers like Termont had to adopt technological changes to remain profitable. But it emphasized that if technology merely changed how checking work would be done, then checkers, and no one else, would have to perform those retooled functions. The ILA accepted that some of the checkers' work might be lost to automation, but it could not be lost to non-bargaining unit workers.

[117] The ILA argued there were no cases, unlike for longshoring, which provided any precision about the concept of checking.

[118] Therefore, it suggested a good understanding of the concept of checking came from various sources:

i) the parties, as they define checking in their collective agreement (Ex-2; Tab 2 at 1.09);
ii) the parties' practices; and
iii) a comparison of the post technological change work with past practice.

[119] The ILA urged the Board to find that checking had to be analyzed on the basis of a continuum. As the MEA-ILA "Selection Test", *supra*, suggested, the checkers had a continuous role from the time a container entered the terminal up to and including its loading onto a vessel. They had a similar continuous role from the time a container came off a vessel until it left through Termont's exit gate.

[120] Along this continuum, the checkers protected the integrity of the shippers' cargo. Their work focussed on the shippers' goods.

[121] In contrast, the ILA suggested security guards focussed on protecting Termont and its own property. When all checkers were laid off at the exit gate, this created a problem with the continuum. Either checking was no longer needed on the continuum or someone else was performing that essential checking work.

[122] The ILA noted that section 1.09 of the collective agreement provided some guidance for the concept of checking, but it was not all inclusive.

[123] The ILA further pointed to the TIR (Ex-4) as an historic document which contained the type of information checkers had been called upon to verify at the end of the continuum, including:

i) the container number;
ii) the container's location;
iii) the seal number;
iv) the container's condition (including damage);
v) whether containers were full or empty; and
vi) the name of the transport carrier.

[124] The purpose of the checking exercise was to certify that any container, whether full or empty, properly left Termont's possession. In the ILA's view, the checkers' work ensured goods never left Termont without authorization. These tasks were essential to prevent fraud on the shippers' property.

[125] For full containers, the checkers' verification of the seal ensured that the right container left Termont. For empty containers, the checker looked inside the container to review its condition after the driver opened the doors. Once satisfied, the checker gave the driver the TIR, who then passed it along to the security guard for a further check.

[126] In the ILA's view, the security guards who worked at Termont protected Termont's property, rather than that of the shipper. The guards' role had increased as a result of the MTSR and the significant security obligations it introduced. The ILA reviewed the MTSR's obligations in some detail and argued the security guards ensured Termont complied. The focus was on the facility and safety, rather than on the shippers' goods.

[127] The ILA noted, for example, that section 335(*d*) of the MTSR stated seals might be examined upon entry, or while stored, but was completely silent about any obligation to verify them at the exit gate.

[128] The ILA compared what transpired at the exit gate before and after the technological change, whether for empty or full containers, in order to argue that AG's guards were performing checking work. When the guards' functions extended beyond protecting Termont's property, and started to involve checking shippers' goods, those activities brought AG within this Board's jurisdiction and the geographic certification.

[129] Moreover, under the old exit gate procedure (Ex-2; Tab 15), the guard's duties included verifying that the checker had completed his/her tasks before a container could leave. This "checking of the checker" ensured a checker was not helping unauthorized cargo leave. This check and balance system no longer existed after the technological change.

[130] The ILA suggested that guards, after the technological change, did traditional checking work at the exit gate in several ways including:

i) verifying if a full container had a seal, a function which was fundamental to the continuum for which checkers were responsible;
ii) inspecting inside empty containers, via camera, a function which only checkers did previously, whether for stowaways, contraband or anything else;
iii) communicating directly with the vehicle driver if needed; and

iv) reviewing additional information on a computer screen, which corresponded with some of the information a checker used to verify on the printed TIR.

[131] The ILA disputed the MEA's contention that the computer system and the OCR technology had taken over all of the checkers' work. The guards verified on their screen the information the checkers used to check. The work process had changed, but it still included essential checking work.

[132] The guards verified that a container leaving Termont was empty. Checkers formerly checked the empty containers, with the help of the driver. This ensured no merchandise belonging to shippers was being spirited out of Termont in an empty container.

[133] The ILA pointed to the process at Terminal 52, which still used the pre-2011 system, as confirmation that the checking of empty containers was done only by checkers, not by guards.

[134] The ILA summarized its position on this issue with this observation: Why does a guard still have to ensure all is correct, if the OCR system is in fact performing the checkers' functions?

2. Is AG a federal undertaking?

[135] The ILA argued that the SCC's recent decision in *Tessier, supra,* had no application to this case. In its view, that case examined whether occasional longshoring work brought an entire undertaking within federal jurisdiction.

[136] The analysis for AG, on the other hand, concerned whether its activities at Termont were vital and essential to Termont's federal undertaking. AG's functions, far from being routine, were vital given Termont's obligations under the MTSR.

[137] Moreover, the ILA noted that the same unit of AG employees worked at Termont; they did not go back and forth between jurisdictions like the employees in *Tessier, supra.* The 20 AG guards (13 full-time; seven part-time) constituted a discreet specially-trained unit for Termont.

[138] The ILA relied on various decisions which found that portions of security guard services could be federally regulated, depending on the facts of each particular case. For example, in *Syndicat des agents de sécurité Garda, Section CPI-CSN* v. *Garda Canada Security Corporation*, 2011 FCA 302 (*Garda*), the FCA found that guard services provided to an Immigration Prevention Center, which ensured the detention of foreign nationals under a federal statute, fell within federal jurisdiction.

[139] The ILA further pointed to numerous Board decisions which had certified security guard companies because their services were vital and essential to a federal undertaking.

3. Is AG actively engaged in longshoring?

[140] The ILA emphasized that even a single discreet incident of performing longshoring work can make an employer subject to a geographic certification: *M&M Manufacturing*, *supra*. If Termont wanted checking work to be done at the exit gate, then AG had to use a checker governed by the terms and conditions of the ILA-MEA collective agreement. When AG started doing checking work at the exit gate, it became obliged to use ILA members.

[141] The ILA further highlighted the Board's past decisions which commented on the importance of protecting a geographic certification from erosion.

B. MEA

[142] The MEA contested the ILA's characterization that AG's security guards' only protected Termont's property, while the checkers protected the shippers' goods. The MEA referred to various MTSR provisions to demonstrate that Termont has responsibility for "goods" and "cargo". It used security guards to meet those legal requirements.

[143] The MEA suggested that the MTSR and the collective agreement created two distinct silos, one for checker work and a second for security guard work. In its view, if security guards carried out similar work to that of a checker, but in conformity with the MTSR, then that work fell outside the collective agreement.

[144] The MEA also noted that the ILA had filed several grievances about these same issues, but all had been covered by the negotiated Letter of Understanding, which included both monetary payments and a release.

[145] The MEA commented on the roles of the security guards and the checkers at the exit gate.

[146] Before the technological change, a checker's duties for empty containers included i) comparing container numbers to numbers on the TIR; ii) inspecting for damage; and iii) adding manual notations to the TIR.

[147] For full containers, a checker's duties included i) inspecting the outside of the container and ii) noting down the seal number.

[148] The MEA suggested that some of this information was already printed on Termont's TIR when the checker received it, while the checker had to add other information by hand.

[149] A security guard prior to the technological change performed related functions, whether the container was empty or full, including checking i) the driver's ID; ii) the transaction number; iii) the container number; iv) the vehicle licence; and v) inside the driver's cabin for unauthorized persons.

[150] After the technological change, no checker worked at the exit gate. The security guards continued to carry out many of their same functions.

[151] But guards did not check for container damage since Termont had decided no longer to provide this service to shippers.

[152] The MEA argued that Termont's OCR system performed all of the checker's former functions at the exit gate. The OCR system, rather than a checker, compared information it identified on the container with information in Termont's computer system.

1. AG's security guards did not perform checking work

[153] The MEA noted the ILA had accepted Termont's technological change since it never contested it at arbitration. The ILA further accepted that AG's guards were doing the type of work guards have traditionally done at Termont. The real issue then was whether guards were doing checking work covered by the collective agreement.

[154] The MEA argued nothing obliged Termont to check containers for damage. They decided no longer to do it after the technological change and advised the ILA of that decision. The MEA reminded the Board that the ILA bore the burden of demonstrating that the guards were checking for damage. The parties did not dispute that section 1.09 of the collective agreement exclusively assigned this damage verification work to checkers.

[155] In addition, the MEA noted that the technological change did not just reduce the number of checkers. Technology had also reduced the ranks of security guards and clerks.

[156] The MEA argued that checking work can be done by a computer without violating the collective agreement. In that regard, the OCR system now confirmed information which checkers formerly had examined in person at the exit gate.

[157] The MEA cautioned the Board about relying on general port training manuals to determine the scope of checker functions. The parties had set out explicitly in section 1.09 of the collective agreement the checkers' main duties. General training manuals did not create new and exclusive checking functions.

2. AG was not a federally regulated employer

[158] The MEA argued that AG was a provincially regulated security guard company. The guards working at Termont did nothing particularly different from their security work for other types of employers. The fact they physically worked at the Port did not make them vital or essential to Termont's federal undertaking.

[159] In this regard, their need for specific training was not that different from the training needed to do work for any client. For example, there was special training to work for a grocery chain.

[160] The MEA further alleged the guards did not work exclusively as a distinct unit at Termont. Rather, once they had worked their established hours, they could work for other employers as well, including those operating other Port terminals or for provincially regulated employers like grocery chains.

[161] Moreover, the guards' work at Termont accounted for a small percentage of AG's overall revenue (Ex-8). The MEA contrasted this small amount with the 14% of revenues that the employer in *Tessier, supra*, obtained for its port-related work. The SCC nonetheless decided that the employer in *Tessier, supra*, did not fall within federal jurisdiction.

3. AG was not actively engaged in longshoring

[162] The MEA suggested that AG's activities did not meet the criterion in section 34 of being "actively engaged" in longshoring. AG was a security company which had nothing to do with longshoring. The focus had to be on the employer's principal activities, rather than on certain ancillary functions its employees might perform.

[163] The MEA argued that the nature of AG's business showed it was not actively engaged in longshoring given that:

i) it employed 408 full-time employees;
ii) it had 62 part-time employees;
iii) its clientele was large and varied;
iv) less than 8% of its activities involved work at the Port;
v) it provided security services which Termont required under the MTSR; and
vi) AG's Termont employees could work elsewhere.

[164] In sum, the MEA said AG was simply a company providing security services to Termont as well as a host of other companies. It was not a longshoring employer.

VI. Issues

[165] This case raised two issues:

A) Is a part of AG's operations subject to federal jurisdiction?; and

B) Is a part of AG's operations actively engaged in longshoring and subject to the geographical certification?

VII. Analysis and Decision

A. Is a part of AG's operations subject to federal jurisdiction?

[166] The ILA has satisfied the Board that a portion of AG's operations falls within federal jurisdiction.

[167] The specific services which AG provides to Termont, which allow the latter to meet, among other things, its important obligations under the MTSR, rebut the presumption that this portion of AG's labour relations remain provincially regulated: *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45.

[168] AG itself is not a federal undertaking, but the evidence demonstrated that AG's security services at Termont are vital and essential to the latter's federal undertaking: *Northern Telecom Limited* v. *Communications Workers of Canada et al.*, [1980] 1 S.C.R. 115.

[169] There are several reasons for this conclusion.

[170] The Board heard considerable argument about the applicability of the SCC's decision in *Tessier*, *supra*, to this case and, in particular, whether AG's security guards formed a discrete employee unit or not.

[171] Tessier operated cranes for construction work and industrial maintenance. However, 14 percent of its overall revenue came from longshoring work. Tessier's employees might work one day at a port and the next day on a construction site.

[172] Tessier did not argue before the SCC that a severable portion of its business doing longshoring work fell within federal jurisdiction. Rather, it argued that the longshoring work it performed brought its entire undivided business within federal jurisdiction.

[173] The SCC acknowledged this was a novel context when applying its established test of derivative jurisdiction. The SCC summarized the two traditional contexts in which it had previously applied the derivative jurisdiction test:

> [48] To date, this Court has applied the derivative jurisdiction test for labour relations in two contexts. First, it has confirmed that federal labour regulation may be justified when the services provided to the

federal undertaking form the exclusive or principal part of the related work's activities (*Stevedores Reference; Letter Carriers' Union of Canada*).

[49] **Second, this Court has recognized that federal labour regulation may be justified when the services provided to the federal undertaking are performed by employees who form a functionally discrete unit that can be constitutionally characterized separately from the rest of the related operation.** In *Northern Telecom* 2, for example, the installers were functionally independent of the rest of Telecom. This Court was therefore able to assess the essential operational nature of the installation department as a separate entity, as Dickson J. noted:

> ... the installers are functionally quite separate from the rest of Telecom's operations. The installers ... never actually work on Telecom premises; they work on the premises of their customers. In respect of Bell Canada, the installation is primarily on Bell Canada's own premises and not on the premises of Bell Canada's customers.... The installers have no real contact with the rest of Telecom's operations. Telecom's core manufacturing operations are conceded to fall under provincial jurisdiction, but there would be nothing artificial in concluding that Telecom's installers come under different constitutional jurisdiction [pp. 770-71]
>
> (See also *Ontario Hydro*, where the employees who fell under federal jurisdiction were only those employed on or in connection with facilities for the production of nuclear energy; *Johnston Terminals and Storage Ltd.* v. *Vancouver Harbour Employees' Association Local 517*, [1981] 2 F.C. 686 (C.A.), and ***Actton Transport Ltd.* v. *British Columbia (Director of Employment Standards)*, 2010 BCCA 272, 5 B.C.L.R. (5th) 1, where certain workers were severable from their employer's overall operation and were therefore subject to different labour jurisdiction.)**

(emphasis added)

[174] The SCC then described the novel situation it faced in *Tessier, supra*:

> [50] **This appeal is the first time this Court has had the opportunity to assess the constitutional consequences when the employees performing the work do not form a discrete unit and are fully integrated into the related operation. It seems to me that even if the work of those employees is vital to the functioning of a federal undertaking, it will not render federal an operation that is otherwise local if the work represents an insignificant part of the employees' time or is a minor aspect of the essential ongoing nature of the operation:** *Consumers' Gas Co.* v. *National Energy Board* (1996), 195 N.R. 150 (C.A.); *R.* v. *Blenkhorn-Sayers Structural Steel Corp.*, 2008 ONCA 789, 304 D.L.R. (4th) 498; and *International Brotherhood of Electrical Workers, Local 348* v. *Labour Relations Board* (1995), 168 A.R. 204 (Q.B.). See also *General Teamsters, Local Union No. 362* v. *MacCosham Van Lines Ltd.*, [1979] 1 C.L.R.B.R. 498; M. Patenaude, "L'entreprise qui fait partie intégrante de l'entreprise fédérale" (1991), 32 *C. de D.* 763, at pp. 791-99; and Brun, Tremblay and Brouillet, at p. 544.

(emphasis added)

[175] The employer in *Tessier, supra*, had not led any evidence which might have allowed the SCC to consider whether a part of it might be subject to federal jurisdiction:

> [51] **In this sense, Tessier's acknowledgment that it operates an indivisible undertaking works against its position that its stevedoring employees render the whole company subject to federal regulation**. If Tessier *itself* was an inter-provincial transportation undertaking, it would be justified in assuming that the percentage of its activities devoted to local versus extra-provincial transportation would not be relevant: *Attorney-General for Ontario* v. *Winner*, [1954] A.C. 541. But since Tessier can only qualify derivatively as a federal undertaking, federal jurisdiction is only justified if the federal activity is a significant part of its operation.
>
> ...
>
> [61] **To be relevant at all, a federal undertaking's dependency on a related operation must be ongoing. Yet we have no information about the corporate relationship between Tessier and the shipping companies, whether Tessier's stevedoring activities were the result of long-term or short-term contracts, or whether those contracts could be terminated on short notice. There is nothing, in short, to demonstrate the extent to which the shipping companies were dependent on Tessier's employees.** As a result, as in the Court of Appeal, no conclusions could even have been drawn about whether those of Tessier's employees who occasionally performed stevedoring activities were integral to federal shipping undertakings. This too argues against imposing exceptional federal jurisdiction.
>
> (emphasis added)

[176] No one suggested in the instant case that AG constituted an undivided undertaking which fell completely within federal jurisdiction. On that basis alone, *Tessier*, *supra*, may be distinguished. The Board is not faced with the all or nothing argument the SCC considered in that case.

[177] The parties led considerable evidence about AG's employees, perhaps as a result of the SCC's comments in *Tessier*, *supra*, about the relevance of a discrete employee unit (see, for example, paragraphs 49–50, *supra*). The IIA argued in favour of a functionally discrete employee unit. The MEA suggested the security guards were an interchangeable workforce for AG's many clients.

[178] As the Board understands the SCC's decision in *Tessier*, *supra*, the issue of a discrete employee unit was only one factor among many in its overall analysis of whether the employer's entire undertaking could fall within federal jurisdiction. The Board did not understand the *Tessier* decision as suggesting that the existence of a discrete employee unit had become a decisive factor when applying the derivative jurisdiction test.

[179] Rather than focussing on whether a discrete employee unit existed, the Board understands it must apply the functional integration test, as reviewed recently in *Actton Transport Ltd.* v. *British Columbia (Director of Employment Standards)* (2010), 320 D.L.R. (4th) 310 (*Actton*), a case which the SCC cited with approval in *Tessier*, *supra* (paragraph 49).

[180] As described in *Actton*, *supra*, the focus of the functional integration test is on the services being provided to the federal undertaking:

> [34] This argument is an expression of the appellants' "all or nothing" approach that they took from the beginning of this dispute, namely, that since Actton is the employer and Actton operates a federally regulated trucking business, all that it does is federal. If that were correct, then the *Empress Hotel* case (*Canadian Pacific Railway Co.* v. *Attorney General for British Columbia*, [1950] A.C. 122, [1950] 1 D.L.R. 721 (P.C.)) and a long line of similar cases would have been decided differently: see, for example, *Westcoast Energy Inc.* v. *Canada (National Energy Board)*. Running a railroad is one thing, operating a hotel is quite another.
>
> ...
>
> [36] **Counsel for the appellants presented a list of hypothetical difficulties if Actton's business was divided jurisdictionally. This is said to inform the jurisdictional adjudication.**
>
> [37] **The answer to this contention is that it is the Constitution which determines jurisdiction, not the style of the business organization or its convenience. If Actton chooses to operate in both jurisdictions, it will have to accommodate both labour and employment schemes.**
>
> ...
>
> [40] In my respectful opinion, the reviewing judge asked the right question and arrived at the correct answer. In his reasons (2008 BCSC 1495, 173 A.C.W.S. (3d) 152), he identified the test for functional integration by reference to the leading authority:
>
> > [46] **Functional integration requires that *prima facie* the provincial undertaking be vital or essential, not just integral, to the federally regulated undertaking. To be "vital or essential" the provincial undertaking must be shown to be "absolutely indispensable or necessary" to the federal undertaking.** The test is strict in order to respect the constitutional boundaries of ss. 91 and 92 of the *Constitution Act, 1867*, and especially to recognize that federal jurisdiction over employment and labour matters is the exception and provincial jurisdiction is the general rule: *Montcalm, supra*, at para. 768.

(emphasis added)

[181] The Board has applied the functional integration test on many occasions. It has concluded in some cases that security guard services were vital and essential to certain federal undertakings.

[182] In *Garda, supra,* the FCA considered whether this Board had jurisdiction over security guards whose functions included ensuring the detention of foreign nationals at a Montreal area Immigration Prevention Center.

[183] Just as in the instant case, the security guards were subject to Quebec's security guard *Decree, supra,* and were represented provincially by the Steelworkers.

[184] The FCA described the applicable constitutional analysis at paragraphs 37 and 38 of its decision:

> [37] The principles and factors set out in *Northern Telecom* are not intended to be applied in a strict or rigid manner; instead, the test should be flexible and attentive to the facts of each particular case: *United Transportation Union* v. *Central Western Railway Corp.*, [1990] 3 S.C.R. 1112, at pages 1139-1140.
>
> [38] Therefore, I propose to first examine the federal undertaking in question and then the services provided by Garda, in order to finally reach a conclusion as to whether there is a "vital", "essential" or "integral" link between the operations of the concerned federal undertaking and these services.

[185] The FCA contrasted the guards' work at the Immigration Prevention Centre with the more general security services the company might provide to other clients:

> [57] We are not dealing here with monitoring public access to a building, or verifying the identity of visitors, or monitoring buildings to prevent theft or other wrongdoings. **Rather, Garda's services to the Immigration Prevention Centre ensure the detention of foreign nationals under a federal statute. None of Garda's other clients may operate a detention centre or enter into a contract with Garda to provide for the detention of individuals. It is therefore wrong to hold that the services provided by Garda for the Immigration Prevention Centre are similar to those services Garda provides to its other clients.** Ensuring the detention of an individual is a service profoundly different and distinct from those provided to Garda's other clients, and this very specific detention service is moreover governed by federal government guidelines, standards and policies with which all the security guards must comply.
>
> (emphasis added)

[186] The FCA held that Garda's services to the Immigration Prevention Centre were also severable from the other security work it did:

> [62] Garda's services for the Immigration Prevention Centre are easily severable from that corporation's other services, the evidence before the Board revealing no contrary impediment. Garda is, in fact, a multinational corporation that manages many service contracts in several provinces and countries. In the Montréal area, Garda manages employees certified under the *Canada Labour Code* as well as employees certified under Quebec's *Labour Code*.

> [63] In light of the record taken as a whole and of the principles applicable to the constitutional analysis at hand, I can only conclude that the security guard services that Garda provides for the Immigration Prevention Centre are a vital, essential or integral part of the operations of this centre.

[187] The FCA further found that this Board's certification of guards providing certain specific security services to federally regulated airports was, by analogy, comparable to its jurisdiction over Garda's guards:

> [71] **The analogy between airport perimeter services and the services provided by the security guards at the Immigration Prevention Centre is clear. In this case, the security guards perform tasks that are essential to the effective detention of foreign nationals held under a federal statute, the *Immigration and Refugee Protection Act*.** These tasks are carried out in accordance with federal policies and directives. The CBSA could not effectively operate the Montréal area Immigration Prevention Centre without the services of the approximately 125 security guards provided by Garda.
>
> (emphasis added)

[188] How does the FCA's *Garda* analysis apply to AG?

1. The federal undertaking

[189] No dispute exists that Termont is a federal undertaking. Termont operates a container facility in the Port, provides services to interprovincial and international maritime transportation, and complies with federal legislation, including the MTSR.

2. AG's services to the federal undertaking

[190] While the Board earlier noted that the existence of a distinct employee unit is not the sole criterion when deciding constitutional jurisdiction, there was nonetheless a clear continuity and permanence among those AG employees working at Termont. Thirteen employees worked permanently at AG. A further seven part-time employees supported them.

[191] The fact some employees could do additional security work after finishing their shifts at Termont did not strike the Board as a persuasive reason to end its derivative jurisdiction analysis.

[192] AG's guards mainly performed access control work for Termont. But AG also had patrol sergeants in two separate vehicles and provided perimeter security at Termont.

[193] AG's guards at Termont were required to undergo special security training and meet the legislative requirements to work at a MARSEC Level 1 facility (an entity described in the MTSR).

[194] The MTSR imposed important security obligations on Termont. For example, Termont had to prepare a Marine Facility Security Plan (Plan), a document which required the Minister of Transport's approval (Section 322).

[195] Section 325 of the MTSR lists some of the important security procedures concerning access to a marine facility that the Plan must contain:

> 325. (1) A marine facility security plan shall contain security procedures, as appropriate to the facility's operations, **to control access to the marine facility** at each MARSEC level and to
>
> (*a*) deter the unauthorized entry of weapons, explosives and incendiaries, including any device that could be used to damage or destroy marine facilities or vessels or harm individuals;
>
> (*b*) secure any weapons, explosives, incendiaries or other dangerous substances and devices that are authorized by the operator to be at the marine facility;
>
> ...
>
> (*f*) identify the locations at which the authorized screening of persons and goods, including vehicles, is to be conducted, and to ensure that these locations are covered to enable continuous screenings regardless of weather conditions.

(emphasis added)

[196] The Plan must further establish security procedures for the handling of cargo:

> 334. A marine facility security plan **shall contain security procedures, as appropriate to the facility's operations, for cargo handling** for each MARSEC level for
>
> (*a*) **deterring tampering** and detecting evidence of it;
>
> (*b*) **preventing cargo that is not meant for carriage from being accepted** or stored at the marine facility without the consent of the operator of the marine facility;
>
> (*c*) identifying cargo that is accepted for loading onto vessels interfacing with the marine facility;
>
> (*d*) controlling inventory at access points to the marine facility;

(*e*) **identifying cargo that is accepted for temporary storage** in a restricted area while awaiting loading or pick up;

(*f*) **releasing cargo only to the carrier specified in the cargo documentation;**

(*g*) **coordinating with shippers and other persons responsible for cargo;**

(*h*) **creating, updating, and maintaining a continuous inventory of certain dangerous cargoes**, from receipt to delivery in the marine facility, that sets out the location in which they are stored; and

(*i*) **the examination of the documentation of cargo entering the marine facility.**

335. For MARSEC level 1, **the security procedures for cargo handling shall include**, as appropriate to the facility's operations,

(*a*) **verifying that cargo, containers and cargo transport units entering the marine facility** match the invoice or other cargo documentation;

(*b*) **routinely inspecting cargo, containers, cargo transport units and cargo storage areas** in the marine facility before and during cargo handling operations to detect evidence of tampering, unless it is unsafe to do so;

(*c*) **examining documents for vehicles entering the marine facility**; and

(*d*) **examining seals and other methods used to detect evidence of tampering when cargo, containers or cargo transport units enter the marine facility or are stored there.**

(emphasis added)

[197] The Board made note of the ILA's comments that some of these provisions, such as sections 334(i) and 335(*d*), deal explicitly with the marine facility's entrance rather than its exit. The Board also notes that the legislation does not mandate who must perform these varied tasks.

[198] Termont decided to use AG to provide specially trained security guards to allow it to meet its important security obligations. AG is not the first security company to work for Termont; it replaced another security firm in 2010 to perform these security functions. The need for such services is continuous, regardless of the particular security company under contract to provide them at any given time.

[199] The Board's next task is to characterize the services AG provides.

3. Are AG's services "vital" or "essential" to Termont's federal undertaking?

[200] The derivative jurisdiction test requires a finding that a "vital" or "essential" link exists between Termont's federal undertaking and the services AG provides to it.

[201] The Board is satisfied this crucial link exists on the facts of this case.

[202] The MTSR imposes significant legal responsibilities on Termont. Termont does not use the security guards merely to operate access gates at a public parking lot. Rather, it uses AG's guards to allow it to meet its significant legal obligations to ensure the safety of the Port and the persons working within it.

[203] In this regard, the Board sees an analogy between the facts in this case and others where it took jurisdiction, such as for security guards providing perimeter security services at an airport (*Securiguard Services Limited*, 2005 CIRB 342), as well as for security screeners at various airports across the country.

[204] The *Code* itself at section 47.3 has specific provisions applying to airport security screeners.

[205] Termont would not be able to operate without the services provided by AG's guards. They ensure that only authorized drivers and licenced vehicles can enter Termont's premises. The obligation to comply with the MTSR, along with the other security functions that AG's guards perform on a regular basis, satisfy the Board that AG is vital and essential to Termont's ongoing operations.

[206] AG's services to Termont bring a severable portion of its undertaking within the jurisdiction of this Board.

B. Is a part of AG's operations actively engaged in longshoring and subject to the geographical certification?

[207] Section 34(7) of the *Code* mandates the Board to decide any questions which arise under section 34:

34. (7) The Board shall determine any question that arises under this section, including any question relating to the choice or appointment of the employer representative.

[208] An examination of the issue whether AG is involved in longshoring includes considering how to interpret the expression "actively engaged" found in section 34 of the *Code*, as well as the different roles carried out by this Board and a labour arbitrator.

1. The concept of "actively engaged" in longshoring

[209] The 1999 amendments to the *Code* (Bill C-19 S.C. 1998, C-26) added the expression "actively engaged" to section 34(1). In French, the *Code* uses the expression « véritablement actifs » to describe the longshoring employers caught by the geographic certification regime.

[210] The pre-1999 sections 34(1) and (2) read as follows:

34. (1) Where employees are employed in

(*a*) **the long-shoring industry**, or

(*b*) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board,

the Board may determine that the employees of **two or more employers in such an industry** in such a geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(*b*) shall be made by the Board unless, on inquiry, it is satisfied that the **employers engaged in an industry** in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(emphasis added)

[211] One notes immediately the lack of the expression "actively engaged" in section 34(1). However, section 34(2) did include the word "engaged". This lack of uniformity changed with the 1999 amendments.

[212] The post-1999 sections 34(1) and (2) now read:

34. (1) Where employees are employed in

(*a*) **the long-shoring industry**, or

(*b*) such other industry in such geographic area as may be designated by regulation of the Governor in Council on the recommendation of the Board,

the Board may determine that the employees of **two or more employers actively engaged in the industry** in the geographic area constitute a unit appropriate for collective bargaining and may, subject to this Part, certify a trade union as the bargaining agent for the unit.

(2) No recommendation under paragraph (1)(*b*) shall be made by the Board unless, on inquiry, it is satisfied that **the employers actively engaged in an industry** in a particular geographic area obtain their employees from a group of employees the members of which are employed from time to time by some or all of those employers.

(emphasis added)

[213] The 1999 amendments for both section 34(1) and (2) added the expression "actively engaged" when describing the longshoring employers. How should the Board interpret this addition?

[214] The SCC in *Canada (Information Commissioner)* v. *Canada (Minister of National Defence)*, 2011 SCC 25, described the proper approach for statutory interpretation:

> [27] The proper approach to statutory interpretation has been articulated repeatedly and is now well entrenched. The goal is to determine the intention of Parliament by reading the words of the provision, in context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act and the object of the statute. ...

[215] It is clear that the words used in the *Code* are paramount. But the Board may also examine the legislative context within which the amendments took place.

[216] The SCC has also had recourse to testimony given before Parliamentary Committees, provided such material is not given undue weight: *Németh* v. *Canada (Justice)*, 2010 SCC 56, at paragraph 46.

[217] The FCA has referred to recommendations made in *Seeking a Balance: Canada Labour Code, Part I, Review* (Ottawa: Human Resources Development Canada, 1995) (the Sims Report) when considering possible interpretations of the *Code*: see, for example, *J.D. Irving Ltd.* v. *General Longshore Workers, Checkers and Shipliners of the Port of Saint John*, 2003 FCA 266 and *Telus Communications Inc.* v. *Telecommunications Workers Union*, 2005 FCA 262.

[218] The Sims Report, which reviewed Part I of the *Code* in the mid-1990s, made numerous recommendations for *Code* amendments, including some related to geographic certifications.

[219] The Board commented in *Air Canada*, 2001 CIRB 104, on the relevance of the Sims Report:

> [51] ... Therefore, the Board must look carefully at the legislative framework in deciding in any particular circumstance what is appropriately required. While the *Sims Report* can be helpful in this exercise, it must never be forgotten that primary regard must be to the words of the Act itself.

[220] While the Sims Report did not refer to the phrase "actively engaged", it did comment that the choice of the employer representative under section 34 be "expressly confined to those stevedore employers **active** in the port". This comment seemingly separated actual stevedoring employers from other employers who might nonetheless be involved in the longshoring industry, but in other capacities:

> **However, we do find merit in the proposal that the choice of the employer representative should be a responsibility expressly confined to those stevedore employers active in the port or ports covered by a particular geographic certification.** This seems to be reasonable and we would also accept that this choice be made on the basis of majority support among these same employers, while noting that some form of weighted voting might be required to take account of the degree of involvement of each employer. ...
>
> ...
>
> RECOMMENDATION:
>
> Section 34 should be amended to provide that:
>
> - the act of choosing an employer representative be expressly confined to **those employers active in the port or ports covered by a geographic area.**
>
> (pages 89 and 90; emphasis added)

[221] A December 9, 1996 session of the Standing Committee on Human Ressources Development examined the addition of the words "actively engaged" to section 34[1]:

> **Mr. Johnston**: On clause 16, could I have a very brief explanation of the clause as it pertains to longshoremen.
>
> **Mr. McDermott**: Section 34 is already in the code, and clause 16 of the bill is clarifying it, shall we say. What is happening here is that the jurisprudence the board has adopted in a number of cases, particularly in the St. Lawrence River ports, is being reflected in the amendments.
>
> The first one, however, is a little different. That comes from the Sims group, where we talk about the "actively engaged". Using the words "actively engaged" is to ensure that, further down in the clause, where the companies are "actively engaged" in longshoring in a port and it's a geographic certification, the companies then have to choose a representative who will act as the employer, so the union will not have to deal with five or six employers. ***They mandate that employer and provide that representative with the power to act as employer, so only those employers that are actually engaged in longshoring can choose the employer's representative.***
>
> ***Some of these maritime employers' associations, as I am sure you have noticed, include not just stevedoring companies but shipping companies, shipping agents, and so on. It's the stevedoring people who have the requirement under the code to choose the employers' representative.***
>
> ***That's the reason to put in "actively engaged".***
>
> (Canada, House of Commons, *Evidence of the Standing Committee on Human Resources Development*, 35th Parliament, 2nd Sess., Meeting No. 42, December 9, 1996 (Chair: M. Bevilacqua), bold in original; italic bold added)

[222] Since the 1999 amendments to section 34, the Board has had occasion to comment on the concept of "actively engaged".

[223] In an early decision, *Secunda Marine Services Limited*, 1999 CIRB 16 (*Secunda 16*), affirmed in *Halifax Longshoremen's Assn., Local 269* v. *Offshore Logistics Inc.*, [2000] F.C.J. No. 1155 (QL) (FCA), the Board considered whether the loading and unloading of oil and gas exploration and supply vessels at a dock in Dartmouth, Nova Scotia, fell within the Port of Halifax's existing geographic certification.

[224] The Board commented on the new phrase "actively engaged" in section 34(1):

> [47] The section provides that if the employees in question are in the longshoring industry, a geographic unit may be deemed appropriate for collective bargaining even if the employees are employed by different employers. The employees in the present matter are doing longshoring work.

---

[1] The Bill in question was Bill C-66, which was never passed. The same addition of "actively engaged" to section 34 was included in the later Bill C-19.

The real issue in question is whether they are ***actively engaged in the industry*** *within the meaning of* the *Code*.

[48] ***The essential question to be addressed, therefore, is whether and when employees doing longshoring work should be viewed as employees actively engaged in the longshoring industry and when it is appropriate to see the longshoring work as an incidental component of some other industry.*** Obviously, in making that determination, it is also of importance that the Board be guided by the text and purposes of the *Canada Labour Code*.

(bold in original; italic bold added)

[225] The Board in *Secunda 16*, *supra*, later suggested some of the factors it would consider when reviewing a geographic certification:

[73] **The potential damage to labour relations in the Port of Halifax and the appropriate effect of section 34 of the *Code* must be carefully considered. If an exception to the geographic certification is justified in Offshore's case, any corporation, by contracting in a similar way with a local corporation to carry out its transportation and longshoring work and combining the longshoring with additional logistical and support work could circumvent the geographic certification and the *Code*'s purposes.** If such work were incidental and occasional only, and integrated with the primary business of the entity undertaking it, it might well escape section 34. However, all longshoring work requires careful scrutiny. Based upon a careful balancing of factors, an employer doing longshoring work at some point will find that its employees are employed in the longshoring industry within the meaning of the *Code*. Offshore, on a careful balancing of factors and considerations, has passed that point here. **The *Code* requires that the Board assess the frequency of the work, its regularity, its severability, whether it is longshoring or ancillary work and the potential threat to labour relations in choosing between alternative characterizations of work. A key question will be whether the employees in question are actively engaged in longshoring. They are here. Parliament intended that certification in the longshoring industry should be more inclusive and not less so in order to prevent the disruption of port operations. The operation here, to a significant extent, is longshoring, the direct operation of loading and unloading ships. The operation is severed from the oil exploration business in its corporate organization and is severable in a labour relations sense**. It occurs frequently and regularly. It serves a number of clients. In all of the circumstances, it is most appropriate that Offshore's present structure and longshoring operations be reflected by requiring that Offshore be included in the Port of Halifax geographic certification.

(emphasis added)

[226] In *Rideau Bulk Terminal Inc.*, 2011 CIRB 608, the Board also commented on the concept of "actively engaged". The Board had concerns if the concept of "actively engaged" was used to divide longshoring employers into two camps:

[137] **In any event, it would defeat the intent and purpose of a geographic certification order if a third-party employer could, on the one hand, have one or more employees engaged in longshoring while, on the other hand, avoid the scope of the geographic certification order by claiming that the employer was engaged in longshoring but somehow less than "actively engaged" in longshoring.** The geographic certification order creates what the CLRB described in its 1991 decision in *Maritime Employers' Association et al. (857)*, *supra*, as a "single labour pool." The

intent and purpose of the geographic certification order does not allow occasional entry into the single labour pool created by that order by employees on the basis that their third-party employer is only sporadically engaged in longshoring (see *Secunda Marine Services Limited*, 1999 CLRB 16). ...

(emphasis added)

[227] The Board shares those concerns regarding the term "actively engaged". In *Rideau Bulk 608*, *supra*, the Board suggested a possible temporal limitation to the expression "actively engaged" at paragraphs 135–136:

> [135] In its argument, RBT stated that the first issue for the Board to determine is whether RBT was an employer "actively engaged in longshoring." As amended effective January 1, 1999, section 34(1) of the *Code* contains the words "actively engaged." It is true that section 34(1) of the *Code* bestows upon the Board a discretion to determine whether "employees of two or more employers actively engaged in the [longshoring] industry in the geographic area constitute a unit appropriate for collective bargaining." **In other words, as the Board understands it, "actively engaged" is a term that describes the activities of the employer at issue at the time the Board is seized of the application for a geographic certification order.** Before the Board may grant a geographic certification order, it must be satisfied that two or more of the employers are actively engaged in the relevant industry. **At the Port of Hamilton, the CLRB made the decision on geographic certification in 1991. That is no longer an issue for this Board when assessing the RBT activities that occurred at Pier 22 in December 2009.**
>
> [136] At this time, the issue before the Board is to construe the description of the bargaining unit set out in the geographic certification order and to determine whether the employer is or is not within its scope. The relevant words in the description of the geographic certification order dated March 8, 1991, are: "all employees of the employers in the longshoring industry at the Port of Hamilton employed as longshoremen." **Stated another way, the words "actively engaged" are not part of the description of the bargaining unit. Accordingly, it is sufficient for the Board to determine, as it has done herein, that RBT is an employer in the longshoring industry at the Port of Hamilton. There is no requirement for the Board to determine, at this time, whether RBT is an employer "actively engaged."**
>
> (emphasis added)

[228] Section 34 requires the Board to look at an employer's operations. Part of that analysis requires the Board to decide whether that employer is "actively engaged" in longshoring. In considering the context of the amendments, as well as the purpose of section 34, the Board concludes that the addition of the expression "actively engaged" merely added clarity to section 34. It did not narrow its application.

[229] A section 34 geographic certification promotes stability in the longshoring industry, as described in *MEA 581*, *supra*, at paragraph 28:

> [28] ... The purpose of the geographic certification provisions contained in the *Code* is to create and maintain stability in the longshoring industry. Parliament has decided that all employers of longshorepersons in a defined region are to have a single bargaining agent and one collective agreement that applies to everyone who performs longshoring work. ...

[230] Both longshoring employers and certified bargaining agents have a common interest in ensuring the respect of a geographic certification.

[231] An employer representative will want to ensure that any employer actively engaged in the longshoring industry pays it the required dues, which was the genesis of the dispute in *Rideau Bulk 608, supra*. This prevents member employers subject to the geographic certification from being undermined by what the CLRB once colourfully described as "free-loaders": *Halifax Grain 157, supra*, at page 165.

[232] Bargaining agents have a similar interest in ensuring that any longshoring employer, whether it knows of the geographic certification or not, respects its legal obligations. Numerous cases before the Board involve a certified bargaining agent asking for confirmation that a geographic certification applied to an employer who had allegedly extended its activities into the longshoring industry.

[233] The expression "two or more employers in such an industry" in the pre-1999 section 34(1) was potentially ambiguous. It was not clear who these longshoring employers included for the vote for the employer representative. Just as being involved in the legal industry does not include only law firms, neither is the longshoring industry necessarily limited to longshoring companies like Termont.

[234] The addition of the expression "actively engaged" was not designed to splinter longshoring employers into two camps depending on their level of engagement. Rather, the addition of the words "actively engaged" separated those actually doing longshoring work from other employers who serviced the longshoring industry. Only those actively engaged in longshoring may vote for the section 34 employer representative to whom they must pay dues.

[235] An overly technical analysis of section 34(1) would lead to dividing stevedoring companies into two camps i.e. the "actively engaged" vs. the not quite enough "actively engaged". It would result in greater confusion about who could vote for the employer representative. Moreover, that analysis would privilege the aforementioned "free-loader" to the detriment of existing longshoring employers.

[236] The Board prefers the interpretation which prevents "free-loaders", assists in identifying voting privileges and respects the rights of both the existing longshoring employers and the certified bargaining agents.

[237] The Board must decide whether a part of AG is actively engaged in longshoring at Termont. The fact that it also provides security services to Termont, which no one disputes, does not answer this key question. The current situation is evidently different from the one in *Cargill*, *supra*, where a provincially regulated company moved its own grain on a wharf after the completion of the all important maritime transportation.

2. The Board's role compared to that of an arbitrator

[238] The MEA referred to *Services Maritimes Québec Inc.*, 2006 CIRB 371 (*Services Maritimes 371*) to suggest this dispute fell within the jurisdiction of an arbitrator. An arbitrator could decide if Termont was violating, *inter alia*, section 1.05 of the collective agreement by asking AG to carry out certain services. However, deciding whether Termont is respecting the collective agreement the MEA negotiated with the ILA does not answer whether AG has become subject to the Board's geographic certification.

[239] In *Services Maritimes 371*, *supra*, a reconsideration panel determined that the original panel erred when it examined whether certain non-bargaining unit individuals performed checking work.

[240] It is important to note, however, that the specific employer in question, Compagnie d'arrimage de Québec Ltée, had already been found to be subject to the Board's geographic certification: *Services Maritimes 371*, *supra*, at paragraphs 9–10. That situation differs from this case where the Board has been asked to decide whether its geographic

certification applies to AG. The decision in *Services Maritimes 371* must be read with that important distinction in mind:

> [92] In this application for reconsideration, the reconsideration panel has carefully read the original panel's analysis about the 13 persons identified in the application and the handling of bulk cargo. **The reconsideration panel has difficulty understanding the legal arguments that led the original panel to extend the scope of its jurisdiction on this matter and to find that those 13 persons did not do checking work.**
>
> [93] Of the 13 persons identified in the original application, seven were supervisors. With regard to the supervisors, the reconsideration panel understands the original panel's reasoning when it concluded that "it is clear that the question of whether supervisors are doing checking work, and consequently the work of the unit, falls expressly within the interpretation of the collective agreement," *Société des Arrimeurs de Québec Inc. (339)*, *supra*, page 39. The original panel added the following comments:
>
> > [105] ... Clause 1.05 states that only members of the bargaining unit may perform the work that is within its jurisdiction.
> >
> > "1.05 Subject to clause 1.07, no person, except those included in the bargaining unit, shall have the right to perform the work that is within the jurisdiction of said bargaining unit.
> >
> > (translation)"
> >
> > [106] It is not the role of the Board to rule on possible contraventions of the collective agreement. That function falls within the exclusive jurisdiction of the grievance arbitrator, as set out in section 57 of the *Code*. The Board may not claim this function as its own on the ground that the members of the union do not have the means to act on their numerous grievances.
> >
> > (*Société des Arrimeurs de Québec Inc.* (339), *supra*, pages 35–36)
>
> [94] However, the reconsideration panel has difficulty understanding the original panel's finding with regard to those supervisors and the six other persons concerned that is set out at the very end of its reasons for decision:
>
> > [122] For these reasons, the Board
> >
> > ...
> >
> > • declares that, unless directly engaged in the loading and unloading of ships, the employees mentioned in paragraph 7 of the application [the 13 persons identified in the original application, including the seven supervisors] are not performing checking work;
> > ...
> >
> > (*Société des Arrimeurs de Québec Inc.* (339), *supra*, page 39)

(emphasis added)

[241] The reconsideration panel found that the issue concerning checking work ought to have gone to a labour arbitrator to decide:

> [95] **Since the Board cannot assume the jurisdiction of an adjudicator in order to determine whether specific work constitutes checking work, and thus work that is the responsibility of the bargaining unit, the Board should have ended its analysis at that point.**
>
> [96] The wording of Local 3810's bargaining certificate is very general, covering "all employees working as cargo checkers for employers in the longshoring industry in the geographical region of the Port of Quebec."
>
> [97] The role of a grievance arbitrator is to determine whether specific work done by certain persons at a certain time constitutes checking work, and thus work that is the responsibility of the bargaining unit within the meaning of the collective agreement.
>
> (emphasis added)

[242] The reconsideration panel compared its role with that of a labour arbitrator:

> [105] The reconsideration panel realizes that the present dispute may cause some confusion with regard to the role of a grievance arbitrator. First of all, **the question of whether bulk cargo is included or excluded from the definition set out in the bargaining certificate cannot alone be the subject of arbitration because determining the intended scope of the bargaining certificate is the Board's role.** However, the actual subject matter of the present application for reconsideration should clearly be the subject of arbitration.
>
> [106] **In fact, Local 3810's real concern is that it believes that certain work done by persons who are not members of the bargaining unit constitutes checking work under clause 1.05 of the collective agreement, and thus, it is work that should be done by the five employees who are members of the bargaining unit. It is the role of an arbitrator to determine whether specific work done at specific times constitutes work that is the responsibility of the bargaining unit within the meaning of clause 1.05 of the collective agreement.**
>
> (emphasis added)

[243] What is the Board's role compared with that of a labour arbitrator in longshoring cases? A reference to section 65 of the *Code* helps illustrate the distinction.

[244] An arbitrator, the parties to an arbitration and/or the Minister may refer certain collective agreement related questions to the Board pursuant to section 65 of the *Code*:

> 65. (1) Where **any question** arises in connection with a matter that has been referred to an arbitrator or arbitration board, **relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement,** the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.

(2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

(emphasis added)

[245] Any referred questions must be limited in scope. They must refer to i) whether a collective agreement exists; ii) the identity of the parties to a collective agreement; and/or iii) which parties or employees are bound by a collective agreement. The last question often arises within the context of a dispute between trade unions about which of two (or more) Board certification orders apply to certain contested work.

[246] These questions, which arise out of previous Board certifications, make it appropriate for the Board to determine them in order to facilitate the arbitration process.

[247] But a section 65 referral does not clothe the Board with any authority to perform the role which is assigned to an arbitrator under a collective agreement. The section 65 questions only address situations where the Board may need to address the impact of some of its past orders and decisions on an arbitration.

[248] In *Équipements Bellemare Ltée* (1995), 97 di 84 (CLRB no. 1112) (*Bellemare 1*), the Board described a referral it had received from a trade union for a longshoring matter:

In this referral made on June 8, 1993 under section 65 of the *Code*, the union asked the Board to declare:

a) that Bellemare is bound by the certification issued to CUPE because it began working in the longshoring industry in the geographical area consisting of the ports of Trois-Rivières and Bécancour;

b) that Bellemare is bound by the collective agreement entered into by the MEA and CUPE;

c) that the collective agreement entered into on December 8, 1992 by the union and the MEA on behalf of the employers engaged in longshoring in this area covers longshoring work performed by Bellemare;

d) that Bellemare must use the services of the employees covered by CUPE's certification.

According to the applicant, Bellemare's employees carried out longshoring work within the geographical boundaries of the ports of Trois-Rivières and Bécancour when they loaded shipments of cement powder aboard vessels for delivery to Mexico during 1993. This work should have been carried out normally by employees covered by CUPE's geographical certification. On June 2, 1993,

the applicant grieved this matter; the grievance was referred to arbitrator Claude Lauzon. The applicant asked that pursuant to section 65, and before the grievance is heard the Board determine the identity of the parties bound by this certification.

(page 86)

[249] The Board examined its role under a section 65 referral:

As we saw earlier, the first two findings sought by the union raise the question of whether Bellemare is bound, first, by the certification order and, second, by the collective agreement in force in the geographical area designated under the certification system established under section 34 of the *Code*. The final two findings, to the extent that they maintain that Bellemare's longshoring activities are covered by the collective agreement and should be carried out by members of the certified bargaining unit, raise instead the question of the consequences of an affirmative answer to the first question. In fact, the Board was asked to declare that the longshoring work and the workers required are governed by the collective agreement now in force. Furthermore, **it should be noted that while all parties agree that the Board has jurisdiction to deal with the first two issues, there is no such unanimous agreement in the case of the final two issues. The respondent and the mis-en-cause argued that, should the Board conclude that Bellemare, or any other company engaged in longshoring, is in fact bound by the certification order and the collective agreement, the arbitrator responsible for interpreting the relevant clauses of the collective agreement would then have to deal with the questions raised by the last two findings sought by the applicant.**

(page 91; emphasis added)

[250] In *Équipements Bellemare Ltée* (1995), 99 di 105 (CLRB no. 1142) (*Bellemare 2*), the Board commented further on its role:

As the Board noted in its earlier decision, the last two findings sought by the applicant deal with the practical effects of the first two findings. In fact, the Board is asked to declare that the activities of Équipements Bellemare found to constitute longshoring are governed by the terms of the collective agreement and to order Équipements Bellemare to use the services of the employees covered by the union's certification. These findings raise the question of the Board's jurisdiction to deal with them insofar as they involve the interpretation of the collective agreement, as counsel for the respondent and the MEA pointed out. **Having determined pursuant to section 65 that while performing longshoring work, the company was bound by the union's geographic certification and by the collective agreement entered into with the union and the MEA, the Board considers that the arbitrator will have to determine the questions raised with respect to the last two findings sought by the applicant.**

(page 108; emphasis added)

[251] The distinction noted above for longshoring cases involving section 65 of the *Code* similarly applies for a section 18 application like that of the ILA in this case. The Board's task concerns whether to accept the ILA's allegation that AG, which no one disputes is a security company, has become subject to the Port's geographic certification. An arbitrator would then

determine the consequences under the collective agreement, if any, which flowed from that determination.

3. Has Avant Garde extended itself into the longshoring industry?

[252] The Board noted in its introduction its conclusion that AG has extended its activities into the longshoring business. This section sets out the reasons for this finding.

a. Should the Board provide an extensive definition of checking?

[253] The ILA urged the Board to create a definition for "checking". The CLRB in *Halifax Grain 725, supra*, noted it intentionally did not provide an exhaustive definition of longshoring:

> Longshoring is not defined in the *Code* and neither is the longshoring industry which is specifically referred to in section 34 of the *Code*. Other than in the *Gagnon and Boucher* decision where the Board picked up the general description of stevedoring work used by the Supreme Court of Canada in *Eastern Canada Stevedoring Co. Ltd., supra*, **this Board has not attempted to define the longshoring industry. This has been deliberate because aside from the obvious functions of actually loading and unloading vessels engaged in marine transportation, longshoring involves various other activities related to loading and unloading. These include, for instance, the handling and checking of goods at the waterfront and the operation and maintenance of equipment used for in connection with the movement of goods in transit.** These related activities vary from port to port depending on local practices; therefore, it is virtually impossible to define the longshoring industry with any degree of certainty.
>
> (page 9; emphasis added)

[254] The Board is similarly not prepared to provide an exhaustive definition for checking.

[255] It is sufficient to note that checking relates to activities linked with the containers and contents which Termont handles for its shipper clients. There is a clear parallel here with the underlying link to maritime transportation which makes Termont subject to federal jurisdiction.

[256] The Board needs to decide therefore whether a part of AG's operations have extended into this area.

b. Do the *Code* and the MTSR create two separate silos?

[257] The MEA argued that two silos exist when it comes to cargo-related duties. It noted that the MTSR created many obligations involving cargo and that Termont was justified in assigning some of these functions to AG's guards.

[258] The Board does not conclude that the MTSR, in the case of a conflict, somehow trumps the *Code* and the Board's existing geographic certification.

[259] The Board sees no reason why the *Code* and the MTSR's security regime cannot co-exist. If the MTSR were to take precedence over any decisions or orders made under the *Code*, then the Legislator could have clearly stated so.

[260] The existence of the MTSR did not satisfy the Board that any container-related duties the guards performed ceased to constitute checking.

c. Why does the Board conclude AG is actively engaged in longshoring?

[261] AG's president, Mr. Yvon Lalonde, described his company's main functions at Termont as providing access control. There was no dispute at the hearing that verifying certain things such as a driver's identification, as well as his/her vehicle's licence, were separate from checking container-related information.

[262] Similarly, visually inspecting inside the vehicle's cab for any extra individuals (stowaways) also fell within these access control services. The ILA did not contest that guards might even, under the old system, "check the checkers", by confirming certain container-specific information on their copy of the TIR.

[263] If the guards at the exit gate following the technological change had no involvement with verifying information specific to the containers, then the Board might have been satisfied that the OCR system now performed all the necessary checking functions any container required before leaving Termont.

[264] However, the evidence demonstrated that AG's guards' duties at the exit gate extended beyond vehicle access control. Specific container-related information still had to be verified by a human being before any container could leave Termont.

[265] The evidence did not provide the Board with the entire picture of the guards' work at the exit gate. No AG guard testified about his/her functions, whether before or after the technological change. The ILA and the MEA had seemingly not discussed together the guards' new computer functions in the security booth after the technological change. The ILA seemed to learn certain details about the guards' computer screens only during the Board's site visit.

[266] The evidence was also occasionally contradictory about the guards' daily functions.

[267] Mr. Batten still spends 70 percent of his time performing checking work at Termont. Prior to the technological change, he suggested that guards rarely, if ever, exited their booths to look inside an empty container. Rather, the driver would open the empty container for inspection and either the driver or the checker would get inside.

[268] On the other hand, both Mr. Chyzenski and Mr. Dubreuil testified that guards checked for contraband or stowaways inside containers from their booths or by exiting to take a look. Mr. Dubreuil agreed in cross-examination it was not a regular part of his job to watch what security guards did at the exit gate. But he had on occasion seen guards exit their booths.

[269] As noted, no guard testified. The evidence satisfied the Board that, whatever Termont's managers might have expected, it was the checkers, rather than the security guards, who regularly ensured that no shippers' goods were inside any empty containers leaving Termont. The pre-2011 procedure (Ex–2; Tab 15), unlike the one adopted after the technological change (Ex–2; Tab 16), made no mention of any obligation for the guards to do a visual inspection of the inside of the empty containers leaving Termont.

[270] The Board accepts that Termont decided as part of the technological change no longer to check containers for damage. While on fewer than five occasions an AG guard might have reported damage, Termont's evidence was not contested that it did not require this task. In fact, it

had taken active steps to advise the guard not to check for damage. If a driver reported damage, however, then Termont would call a checker to perform a damage check.

[271] Prior to the technological change, checkers ensured that empty containers leaving Termont's premises were in fact empty. Following the technological change, the vehicle driver still got out to open the empty container, as had been the procedure before. But now the AG guard, via a remote controlled camera, ensured that the inside of the container was empty.

[272] The guards' functions following the technological change were not limited to verifying information about the vehicle transporting the container and its driver. Conceptually, one might think that if all the checkers' functions were now being done by the OCR system, then the guard would only be left with these vehicle-specific access control functions. Any verification of container-specific information would no longer be needed because the OCR system had already done it.

[273] But the evidence showed that, after the technological change, the guards still had to verify information specific to each container before it could leave Termont.

[274] For example, before the technological change, the checker used the TIR to confirm important information about empty and full containers. Once satisfied with the information already on the form, and that which the checker added manually at the gate, the checker gave the TIR to the driver.

[275] The driver then took the TIR to the guard who verified the transaction before allowing the vehicle and the container to exit.

[276] Termont's written exit gate procedure prior to the technological change (Ex-2; Tab 15) illustrated the guards' involvement with the checkers' process. For example, subparagraph (g) of the policy illustrated that the guard acted as a second check of what the checkers had done:

> g) It is the responsibility of the security guard assigned to this post **to ensure that the checker, as well as all security functions have been completed** before opening the gate to allow a truck/container to exit.
>
> (emphasis added)

[277] The guards' verification involved the information found on the TIR, as noted in subparagraphs (c), (e) and (f) of the procedure:

> c) That upon the arrival of a truck at the exit gate, they select the "FIND BY PLATE" option in the database. They must then enter the license plate number of the truck which is before them and then click OK. **This will bring up all the pertinent information with regard to the truck/container, this includes the transaction number as per the TIR, the name of the transport company, tractor's license plate number and container number, if the container is empty, full** or if the truck is leaving empty frame or if it was a destuffing, etc.
>
> ...
>
> e) **The security guard on duty at the document verification station MUST compare all the information found on the computer system monitor.**
>
> f) The information MUST correspond EXACTLY with all the information that he / she has before them.
>
> a. Transaction Number
> b. Container Number
> c. Licence Plate number of the truck
>
> (emphasis added)

[278] The ILA did not dispute that Termont could ask the guard to perform this review of its members' work. It accepted the process as a "checking of the checkers".

[279] After the technological change a paper TIR no longer existed. Mr. Batten in his evidence suspected that the digital equivalent of the TIR now appeared on the guards' screens in the security booth. Mr. Dubrueil denied the TIR was displayed on the screen, but did confirm that the information formerly on the TIR now appeared on the guards' screen.

[280] Mr. Chyzenski agreed in cross-examination that the guards were obliged to peruse this information before allowing a container to leave.

[281] Following the technological change, the guard also had a new responsibility to ensure that every full container had a seal. The pre-2011 procedure (Ex-2; Tab 15) only referred to situations where "an exception or an anomoly to a security seal is noticed…". Termont no longer verified the actual seal number. But it would not let a container leave its control without confirmation that the container had a seal. Mr. Dubrueil testified that the camera the guard used could not read the number on the seal, but it did confirm if the container had one.

[282] As Mr. Dubreuil testified, if a container had no seal then a checker had to be called. The Board finds it somewhat incongruous that no checking occurs when verifying if a container has a seal, but becomes checking if the container has no seal. Both activities fall within the container-specific concept of checking referred to earlier.

[283] The above evidence satisfied the Board that AG's guards regularly, indeed for each and every container which left Termont, confirmed container-specific information. The guards cannot allow a container to leave Termont's possession unless that information checks out.

[284] It is these continuous container-specific functions which brings a part of AG's activities within the scope of the Board's geographic certification.

[285] As with most cases involving a review of the scope of a section 34 geographic certification, AG's longshoring activities are not its main activity. But AG's regular work relating to Termont's containers are the checking equivalent of a third party's loading or unloading of a vessel. These activities bring a portion of AG within the Board's geographic longshoring certification.

[286] The Board emphasizes that its decision deals only with the scope of its geographic certification. These conclusions expressly do not decide any grievances arising out of the collective agreement. Such matters fall within a labour arbitrator's jurisdiction.

VIII. Summary

[287] The Board offered the parties its mediation services in order to explore whether a labour relations solution might be preferable to a formal written decision. The parties indicated they required a decision on the merits of this case, as is their entitlement.

[288] The Board has concluded that a portion of AG's activities falls within federal jurisdiction. AG's security services are vital and essential to Termont's federal undertaking. This results in large part, though not exclusively, from Termont's important obligations under the MTSR.

[289] The Board has also concluded that its geographic certification applies to AG's operations at Termont because the constant checking functions it carries out for containers demonstrated it was actively engaged in the longshoring industry.

[290] The Board grants the ILA's application and confirms that AG's work at Termont makes it a longshoring contractor for the purposes of the Board's existing geographic certification order in the Port.

[291] The Board's decision in this case deals with the scope of the Board's geographic certification. This decision does not determine any issues under the parties' collective agreement. Any issues which might arise under the collective agreement, including disputes about how to characterize specific work functions, as well as arbitration-related defences, remain solely within a labour arbitrator's jurisdiction.

Graham J. Clarke
Vice-Chairperson